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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-855

MILTON SANTIAGO and JAMES BRETTHOLZ,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Milton Santiago and James Bretholz pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming their convictions, in the United States District Court for the Eastern District of New York, of three counts of violations of federal narcotics laws (21 U.S.C. §§ 841 (a)(1) and 846) and, in the case of petitioner Santiago, of one count of assaulting a federal agent in violation of 18 U.S.C. § 111.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, is printed in Appendix A to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on October 3, 1973. A timely petition for rehearing was denied by an order entered November 1, 1973, that order being printed as Appendix B to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether it is permissible to introduce against a defendant evidence of prior criminal acts on the theory that they show his intent, when the defense of lack of intent is neither raised by the defendant nor possible under the facts of the case.

Statement of the Case

A. The Indictment

The indictment originally charged petitioners and three other persons—Jerry A. Rosenblum, Jory Ira Prince and Lon M. Posner—with three separate violations of the federal narcotic laws, all allegedly committed on August 5, 1972. Count One charged that each had knowingly possessed cocaine with intent to distribute it. Count Two alleged that each, on that same day, attempted to distribute that same cocaine. Count Three charged that, on that same day, each had conspired with the others to conceal, possess and distribute that same cocaine. Petitioner Santiago alone was named in Count Four, which alleged that, on the same date, he assaulted, impeded and inti-

midated a federal narcotics agent who was engaged in the performance of his official duties.

Prior to trial, Rosenblum, Prince and Posner pleaded guilty to Count Three and, not yet sentenced, appeared as Government witnesses at petitioners' trial.

B. The Government's Case

In essence, the Government's case was that an informer, one Gary Kaplan, asked petitioners' co-defendant Rosenblum if he could supply him with some cocaine. Temporarily unsure of his ability to do so, Rosenblum contacted co-defendant Prince who, similarly unsure, contacted co-defendant Posner.[1] Posner, so he said at trial, arranged with Brettholz that the latter would deliver the required half-pound of cocaine to him at Prince's house.

At about the time scheduled for delivery, Rosenblum, Posner and Prince, in the latter's house, awaited Brettholz and the cocaine. Brettholz arrived with the drug, accompanied by Santiago and was, so the Government witnesses said, in the act of selling the cocaine when noises in the hall below caused all to scatter, believing that they were about to be caught in a police raid. Their suspicions were confirmed. The informer Kaplan (the supposed ultimate purchaser of the cocaine) had been waiting outside with federal narcotics agents, who stormed the house after learning that the cocaine had arrived.

Brettholz, then in the room where the transfer was said to have taken place, grabbed the cocaine and escaped through a window, surrendering himself to the authorities a few days later. Santiago was arrested in a downstairs hallway where, so the testimony went, he had been stand-

[1] Rosenblum, Prince and Posner, having pleaded guilty but awaiting sentence, testified against petitioners at the trial.

ing guard and where he had grappled with one of the federal agents involved in the raid. The cocaine was found on the roof of a garage adjacent to what was said to have been Brettholz' escape route.

C. The Petitioners' Case

Petitioners both admitted being in Prince's house, but denied ever possessing the cocaine later found on the garage roof. Their presence in the house, they said, was prompted by Brettholz' intended purchase, by pre-arrangement, of marijuana from Posner, and by Santiago's agreement to accompany Brettholz to the place of purchase so as to provide protection to his friend.

The conflicting testimony thus sharply fixed the crucial issue in the case. The Government witnesses, all admitted drug sellers, swore that petitioners had possessed cocaine with intent to sell it, and had attempted to do so in furtherance of their conspiracy to do so. Petitioners, on the other hand, swore that they never possessed any cocaine, but were present at the scene of the raid while attempting to purchase the marijuana later found there.[2]

It was this conflict in testimony which formed the background of the crucial evidentiary ruling which prompts this petition.

---

[2] A small amount of marijuana was found in the room where the cocaine sale was said to have occurred. Although Posner denied having brought it there, it was found in a bag which he admitted having brought with him on his trip to Prince's house. The evidence as to the finding of the marijuana was stricken by the trial court in a ruling complained of without success in the Court of Appeals but not involved in this petition.

D. The Crucial Evidentiary Ruling

Early in the trial, the prosecutor announced that he intended to offer testimony that Brettholz had sold cocaine to Posner on ten occasions prior to the event about which the trial revolved. The theory of admissibility accepted by the trial court was that:

> [I]t is pretty well established that proof of each commission of acts of a similar nature previously and not too remotely, of course, but previously, is some evidence of intent in a crime where intent is a necessary factor as it is in this case.

The Prosecutor then said:

> Again, as I have indicated, I would offer it on the theory that you have indicated, that is the prior similar acts indicating the intent upon the defendant James Brettholz' part on this other occasion.

The trial court then stated that:

> I think the testimony would be admissible for the purpose as I have stated a moment ago, that is to show intent on the part of the defendant Brettholz.

Defense counsel objected, but the evidence was ruled admissible.

During the direct testimony of Posner, and pursuant to the trial court's ruling, the prosecutor elicited testimony that, on ten prior occasions, Brettholz had sold cocaine to Posner.[3] Posner also testified that he and Brettholz had "snorted" cocaine together on occasion. On redirect examination of Posner, the prosecutor once again elicited testi-

[3] When testifying before the grand jury, however, Posner swore that Brettholz had never indicated that he could supply him with cocaine.

mony about Brettholz' alleged sales of cocaine and delved into the price which Brettholz had charged. He also mentioned the sales in posing other questions to Posner. Further, he cross-examined Santiago about the alleged sales. Finally, when cross-examining Brettholz, he questioned him about his alleged "sniffing" of cocaine with Posner. Thus, the jury was not allowed to forget the allegation that Brettholz had previously sold cocaine to Posner.

Reason for Granting the Writ

This petition presents an issue in the law of evidence of fundamental importance to the administration of criminal justice in the federal courts. It involves the circumstances under which the Government, in its direct case, may elicit testimony of a defendant's prior illegal acts. Here, the precise question is whether such testimony may be introduced for the ostensible purpose of showing the intent with which the defendant performed an act when the defendant himself denies its performance.

We concede, of course, that evidence of a defendant's prior similar acts, even though criminal, is admissible where it is relevant to negative a claim of lack of intent or to prove an essential element of intent. Had the court below merely enforced that traditional rule, this petition would not have been written. But it did far more than that, for it held such evidence admissible on the issue of intent even where, as here, intent was not and could not possibly have been an issue in the case. Petitioners did not admit possession of the cocaine while defending upon the ground that they neither intended nor attempted to sell it: instead, they categorically denied possession. Moreover, if the Government's testimony that petitioners brought the cocaine to Prince's house and stated its price were believed, no defense of lack of intent was possible. Nevertheless, the court below upheld the admission of Posner's testimony

about Brettholz' prior sales to him on the issue of intent and, in so doing, turned its back upon the rule espoused in other circuits and by the leading authorities in the field of evidence.

The general rule is stated thusly in McCormick, Evidence § 190 at 450 n. 42 (2d ed. 1972):

> However, when the act charged is not equivocal, but the criminal intent is a necessary conclusion from the act, this theory of other acts as showing intent may not be availed of.

Wigmore recognized the rule in a number of passages. For example:

> Where the act itself does not *per se* show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act, . . . 2 Wigmore, Evidence § 302 at 197 (3d ed. 1940), quoting with approval from Grove, *J.*, in *Blake* v. *Assurance Co.*, L.R. 4 C.P.D. 94, 98.
>
> * * * * *
>
> It will be seen that the peculiar feature of this process of proof [i.e., proving intent by prior similar acts] is that the *act itself is assumed to be done,* either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent. 2 Wigmore, Evidence § 302 at 200 (3d ed. 1940) (emphasis in original).

See also 1 Wharton, Criminal Evidence § 237 (12th ed. 1955).

Since the foremost authorities agree on the point, it is no surprise that other circuits have enforced the very rule which the court below rejected. For example:

In *United States* v. *Fierson,* 419 F.2d 1020 (7th Cir. 1969), a prosecution of defendant for impersonating an F.B.I. agent, it was held reversible error to introduce a prior similar impersonation upon the issue of intent where, except for requesting a charge on the subject, the defendant had never raised the issue of intent.

In *United States* v. *Birns,* 395 F.2d 943, 946 (6th Cir. 1968), the Sixth Circuit, in reversing a conviction, stated that:

> [T]here was no defense asserted here that defendant did not intend to misrepresent his assets and *unless the question of intent is in dispute,* evidence concerning the commission of similar acts at other times should not ordinarily be admitted (emphasis added).

A similar issue was similarly disposed of in *Fallen* v. *United States,* 220 F.2d 946, 948-49 (5th Cir. 1955), where the Fifth Circuit stated:

> We think that there could have been no real question of Trice's criminal motive if, in fact, he changed the numbers on the stolen automobiles. Proof of the commission of the act carried with it the evident implication of a criminal intent. In such instances, evidence of the perpetration of other like offenses is not needed to establish criminal motive or intent and is not admissible for such purposes. . . . It is practically impossible for us to believe that the evidence was offered by the Government actually and in good faith to prove motive or intent. Trice had no notice of, nor opportunity to defend himself against, the criminal acts testified to by Goldman. As to Trice, Goldman's testimony was most harmful, and its admission must result in a reversal of his conviction.

In *Bullard* v. *United States*, 395 F.2d 658, 660 (5th Cir. 1968), the applicable rule was said to be that:

> *Where an accused's conduct for which he is on trial is ambiguous in nature*, that is where wrongful if done with an improper intent but not criminal if done innocently, testimony of prior conduct by the accused may be shown to assist the jury in resolving the issue of intent (emphasis added).

In *Waller* v. *United States*, 117 F.2d 171, 175 (9th Cir. 1949), the Ninth Circuit stated that:

> Under familiar principles, relevant evidence of other offenses or acts, if similar and not too remote, may be admissible on the issue of fraudulent intent if such intent is a constituent *and disputed* element of the crime with which the accused is charged (emphasis added).

Here, of course, if Brettholz did what the civilian witnesses said he did, there could be no dispute about his intent.

A case directly in point is *Grantello* v. *United States*, 3 F.2d 117 (8th Cir. 1924). There, in a prosecution for possession of morphine with intent to sell it, testimony was received that the accused had sold drugs on prior occasions. In reversing the conviction, the Eighth Circuit held on page 119 that:

> It is neither competent, fair, nor just to a defendant to receive evidence against him of like offenses to those charged in the indictment under which he is on trial, where no question of his intent is in issue, and no connection between such offenses and those charged is proved.

We respectfully submit, therefore, that there is a conflict among the various circuits on this issue.[4]

Perhaps the best exposition of the well-settled rule rejected below is to be found in the leading state case of *People* v. *Molineux*, 168 N.Y. 264 (1901). There, in a prosecution for a murder obviously planned in advance, the prosecution was permitted to introduce testimony linking the defendant to another murder. After an exhaustive analysis of the case law on the subject, the New York Court of Appeals, at page 299, asked:

> Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that in the face of such irrefragable *indicia* of murderous intent it is still necessary or proper to prove the commission of other similar crimes to establish intent? These questions carry their own answers. If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of the act.

Later, at page 305, on a similar issue, the court used words that could have been written for this very case:

> It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake.

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[4] Indeed, the ruling of the court below appears to fly in the face of prior holdings by the same court. See, e.g.: *United States* v. *De Cicco*, 435 F.2d 478 (2d Cir. 1970).

The same thought was expressed thusly by Lord Summer in *Thompson* v. *The King,* (1918) App. C. 221, 232:

> Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice.

Had Brettholz taken the position that everything which Rosenblum, Prince and Posner had said about his conduct at Prince's house was true, but that he did not intend to sell the cocaine—that, indeed, would have been a "fancy" defense. But no such defense ever was, or could have been, offered. Thus the evidence of the supposed prior sales had the sole effect of showing a propensity to commit crime.[5] American courts have always rejected such evidence.

We respectfully submit that the holding below is inconsistent with the rule in other circuits and with the teachings of our system's leading exponents of the law of evidence. It permits, under the guise of showing intent, evidence of bad character. If followed by other courts, it will severely impair an accused's right to a fair trial. It should be nipped in the bud.

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[5] Although the alleged prior crimes were those of Brettholz, their admission was error as to Santiago as well. See, e.g., *Hamilton* v. *United States,* 409 F.2d 928 (5th Cir. 1969).

CONCLUSION

For the foregoing reasons, the writ of certiorari prayed for should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion by *Moore, Circuit Judge*

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 1097—September Term, 1972.

(Argued July 19, 1973 Decided October 3, 1973.)

Docket No. 73-1895

UNITED STATES OF AMERICA,

Appellee,

—against—

JAMES BRETTHOLZ and MILTON SANTIAGO,

Appellants.

Before:

MOORE and OAKES, *Circuit Judges;*
TYLER,* *District Judge.*

Appeals from judgments of conviction entered after trial by jury in the United States District Court for the Eastern District of New York, Leo F. Rayfiel, *Judge.* Both appellants found guilty on all counts of a three-count indictment charging violations of federal narcotics statutes, 21 U.S.C. §§ 841(a)(1) and 846; appellant Santiago also

* Hon. Harold R. Tyler, Jr., United States District Judge for the Southern District of New York, sitting by designation.

named in, and found guilty under, a fourth count charging assault of a federal narcotics agent, in violation of 18 U.S.C. §§ 111 and 1114. On appeal appellants allege reversible error stemming from the trial court's (1) admission into evidence of prior criminal activity; (2) exclusion of certain evidence; and (3) failure to give an instruction not requested by defense counsel.

Affirmed.

PATRICK M. WALL, New York, N. Y., *for Appellants.*

JOHN L. CADEN, Assistant United States Attorney, Brooklyn, N. Y. (Robert A. Morse, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., and L. Kevin Sheridan, Assistant United States Attorney, of counsel), *for Appellee.*

MOORE, *Circuit Judge*:

James Brettholz and Milton Santiago appeal from judgments of conviction entered after trial by jury in the United States District Court for the Eastern District of New York. The indictment charged appellants and three other persons, Jerry A. Rosenblum, Jory Ira Prince, and Lon M. Posner, in three counts with violations of the federal narcotics laws: Count I charged defendants with knowingly and unlawfully possessing with intent to distribute one quarter kilogram of cocaine, in violation of 21 U.S.C. § 841(a)(1); Count II charged defendants with attempted distribution of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846; Count III charged defendants with conspiring to conceal, possess, and distribute cocaine, in violation of 21 U.S.C. § 841(a)(1).

A fourth count, naming appellant Santiago only, charged him with forcibly assaulting, impeding, and intimidating a federal narcotics agent engaged in the performance of his official duties, in violation of 18 U.S.C. §§ 111 and 1114.

Prior to trial, defendants Rosenblum, Prince, and Posner pleaded guilty to Count III, the conspiracy count, and appeared as government witnesses against appellants Brettholz and Santiago.[1] Both appellants were found guilty as charged on the first three counts of the indictment; Santiago was also found guilty on Count IV. Brettholz was sentenced to a term of five years on each of the first three counts, the sentences to run concurrently, plus a parole term of three years, plus a fine of $1,000 on each count, for a total of $3,000. Santiago was sentenced to a term of five years on each of the first three counts, the sentences to run concurrently, plus a special parole term of three years; he was sentenced on Count IV to a term of imprisonment of three years, the sentence to run concurrently with those imposed under the first three counts of the indictment.

On appeal appellants raise no material issues of fact but argue (1) that reversible error occurred when the trial court permitted the introduction of testimony by co-defendant Posner that Brettholz had sold cocaine to Posner on ten prior occasions; and (2) that reversible error occurred when the trial court instructed the jury not to consider evidence which, appellants allege, tended to impeach the testimony of government witness Posner and supported the testimony of appellants. In addition, appel-

[1] Following appellants' trial, Rosenblum and Prince were each sentenced to a term of imprisonment of six months, plus a special parole term of five years. Posner was sentenced to a term of imprisonment of eighteen months, plus a special parole term of five years. After sentencing, the trial court, on government motion, dismissed Counts I and II against each of these defendants.

lant Santiago argues (3) that the trial court committed plain and reversible error by failing to instruct the jury on the issue of self-defense with respect to Count IV, the assault count. We reject all three claims urged by appellants and, consequently, affirm the judgments of conviction.

A brief recital of the facts concerning this attempted sale of cocaine is necessary to a determination of the issues raised by appellants.

At trial the government's evidence established that during the last week of July, 1972, after he had been contacted by government informer Gary Kaplan, co-defendant Jerry Rosenblum telephoned co-defendant Jory Prince for the purpose of securing one-half pound of cocaine. Prince in turn telephoned co-defendant Posner, who indicated that he would see whether he could find a source for the narcotic. Several days thereafter Posner contacted appellant Brettholz, informed the latter that he had a prospective purchaser of cocaine, and asked whether Brettholz could supply the drug. Brettholz told Posner to call back later that week; Posner did so and on that occasion Brettholz indicated that he could supply the half-pound of cocaine, and that he would meet with Posner the following day, August 5, 1972. (Trial Transcript, hereinafter "Tr.", at 326-27).

The next day Brettholz met with Posner at the latter's place of business, a car wash located in Far Rockaway, New York, which was co-managed by co-defendant Prince. Brettholz gave Posner a small sample of cocaine for the latter's customer to "taste", indicating that he would be able to supply only seven, and not eight, ounces of the drug (Tr. 328-31). Posner then gave Brettholz the telephone number at co-defendant Prince's home in Far Rockaway, instructing Brettholz to telephone him there at 7:30 that

evening (Tr. 331-32). After Prince himself had "tasted" the cocaine sample, he and Posner telephoned Rosenblum, who in turn contacted government informer Kaplan, with the information that the deal would be consummated that evening at the home of Jory Prince (Tr. 152, 332). Kaplan quickly contacted the federal narcotics agent to whom he informed, Agent Hall, who made plans to be present with other agents and Kaplan in the vicinity of Princes' home that evening.

At approximately 7:30 that night, the various characters in this narrative began to arrive at Prince's house. First to arrive were Posner and Rosenblum, who went up to Prince's upstairs bedroom for conversation. Posner had brought with him a brown shopping bag containing a scale with which to weigh the cocaine to be brought to the house by appellants Brettholz and Santiago; at trial Posner testified that the shopping bag had contained nothing but the scale (Tr. 400, 433). In addition to the scale, Posner had brought the cocaine sample supplied earlier that day at the car wash by appellant Brettholz (Tr. 336-37). Next to arrive at the house was government informer Kaplan, who secretly had been waiting in a parked auto with two federal undercover narcotics agents; Rosenblum went to the parked auto and accompanied Kaplan to the Prince house. All persons again convened in Prince's upstairs bedroom. Kaplan "tasted" the cocaine, expressed approval, and was told to go back to his auto until the full supply of the drug had arrived (Tr. 165, 178-79). At this same time the pre-arranged telephone call from Brettholz was received at the Prince residence (Tr. 179, 340). Posner told Brettholz that "everything seemed to be all right, everything looked cool and he should come by" (Tr. 340). Brettholz announced that he would do so after finishing his dinner.

At approximately 9:00 p.m. that evening appellants Brettholz and Santiago arrived at the house. The two men immediately went to the upstairs bedroom to confer with co-defendants Rosenblum, Posner, and Prince (Tr. 341-43). After expressing concern at the number of autos parked outside, announcing that the cocaine was still in their auto, and looking around the house to chart an escape route just in case something went wrong (Tr. 185, 189), Brettholz, accompanied by Santiago, went back to their auto, to return to the house a few minutes later with the cocaine. Upon their return, Santiago positioned himself downstairs at the front door while Brettholz took the cocaine to the upstairs bedroom (Tr. 190-91). Brettholz asked Rosenblum if he was the buyer; answering in the negative, Rosenblum then went outside to get the "purchaser," government informer Kaplan. Rosenblum and Kaplan re-entered the house and were promptly searched for weapons by appellant Santiago, who was still keeping his vigil at the front door (Tr. 127-28). Once upstairs Kaplan "snorted" or sampled the cocaine which Brettholz had brought, expressed satisfaction with the deal, and left the house, ostensibly to go to his auto for the purchase money (Tr. 464).

Back at the auto, Kaplan informed the agents that the cocaine had arrived. At this point Kaplan and agents Hall and Lightcap went to the house. Lightcap waited outside. Santiago, still standing watch at the front door, latched the door after Kaplan and Agent Hall had entered, and admonished Kaplan for bringing others to the house against orders (Tr. 467). Santiago, using colorful expletives to make his point, further warned Kaplan and Hall that nothing had better go wrong because "We f--- people that f--- us" (Tr. 467). While Santiago was searching Hall for weapons, the latter unlatched the door to allow Agent Lightcap to enter; thereupon, HaHll took out

his badge, identified himself to Santiago as a federal agent (a fact which appellant Santiago disputes), and announced an arrest (Tr. 469-70). Santiago responded by throwing a punch at Agent Hall and screaming, "Jimmy, Jimmy," appellant Brettholz's nickname (Tr. 505). Other agents quickly entered the house and ran to the upstairs bedroom. Having heard all the commotion, defendants Prince, Posner, Rosenblum, and Brettholz went into action upstairs; Brettholz grabbed the cocaine and was seen by Agent Hall to be leaving out of a bathroom window. In the ensuing chaos, Brettholz escaped, only to turn himself in several days later. The other defendants were arrested on the spot.

After the arrests the agents conducted a search of the premises and the surrounding vicinity. A small plastic bag containing seven ounces of cocaine was found on the roof of a garage located directly behind the Prince house (Tr. 528). The agents also found three small bags of marijuana in a shopping bag stuffed into a drawer of a bureau in Prince's bedroom (Tr. 537).

At trial both Brettholz and Santiago testified in their own defense, and each supported the other's testimony. In essence, their defense was that they had gone to the Prince house not with the intention of selling cocaine, but for the purpose of buying marijuana from Posner for their personal use. The jury returned a guilty verdict on all counts of the indictment.

Appellants' first argument on appeal is that the trial court committed reversible error by permitting a government witness, co-defendant Posner, to testify that he had bought cocaine from appellant Brettholz on ten occasions within a year prior to the transaction in question. Prior to Posner's testimony the Assistant United States Attorney

made an offer of proof to the trial court as to what Posner would testify, i.e., that Brettholz had sold cocaine to him on ten prior occasions. The prosecutor asked that the testimony be admitted on the theory that the ten prior sales "show[ed] that there was intent to distribute on the part of defendant [Brettholz] as opposed to being used for his own personal use" (Tr. 136). The trial court ruled that the offered testimony would be admitted, as it later was over defense objection, on the ground that:

> [I]t is pretty well established that proof of each commission of acts of a similar nature previously and not too remotely, of course, is some evidence of intent in a crime where intent is a necessary factor as it is in this case (Tr. 137).
>
> * * * * *
>
> I think the testimony would be admissible for the purpose I have stated a moment ago, that is, to show intent on the part of the defendant Brettholz (Tr. 138).

Appellants contend that the admission of Posner's testimony was reversible error since, they argue, "there was not and could not be any real issue of intent in the case" (Brief, hereinafter "Br.", at 13). We disagree.

The law in this Circuit is that evidence of prior similar acts is admissible "for all purposes except to show the criminal character or disposition of the defendant." *United States* v. *Warren*, 453 F.2d 738, 745 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972). *See also, United States* v. *Denton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Knohl*, 379 F.2d 427, 438 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966); McCormick, Evidence § 190, at 447 *et seq.* (2d ed. 1972). The case law and the legal scholars uniformly indicate that such evidence is admissible

if offered to prove knowledge, intent, or design on the part of the defendant; 2 Wigmore, Evidence § 300, at 192-93 (3d ed. 1940); McCormick, *supra*, Evidence § 190 at 449; *United States* v. *DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970). In ruling on the admissibility of such evidence, the trial judge is required to balance all of the relevant factors to determine whether the probative value of the evidence outweighs it prejudicial character. *Spencer* v. *State of Texas*, 385 U.S. 554, 561 (1967); *United States* v. *Denton*, *supra*, 381 F.2d at 117. As summarized by one scholar,

> the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.

McCormick, *supra*, Evidence § 190 at 453. *See United States* v. *Byrd*, 352 F.2d 570, 574 (2d Cir. 1965).

Appellants place great reliance upon the concurring opinion of Judge Lumbard in *United States* v. *DeCicco*, *supra*, and upon opinions from other circuits, for the proposition that evidence of similar prior acts is not admissible unless the defendant himself has first raised the issues of motive or intent. *See* 435 F.2d at 486. Appellants' reliance is misplaced, however, since the cases in this Circuit provide otherwise. *See, e.g., United States* v. *Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971), where we held:

> Evidence of similar acts by a defendant is admissible to prove his knowledge, intent, or design if knowl-

> edge, intent, or design "is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." *United States* v. *DeCicco,* 435 F.2d 478, 483 (2 Cir. 1970).

See also, United States v. *Birrell,* 447 F.2d 1168, 1172 (2d Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972); *United States* v. *Egenberg,* 441 F.2d 441, 443-44 (2d Cir.), *cert. denied,* 404 U.S. 994 (1971); *United States* v. *Klein,* 340 F.2d 547, 549 (2d Cir.), *cert. denied,* 382 U.S. 850 (1965).

In the case before us, intent was placed in issue by the defendants themselves in maintaining that they had gone to the Prince house not with the intention of selling cocaine (although the proof overwhelmingly showed otherwise), but with the intention of purchasing marijuana for their own use. Under the circumstances, it cannot be said that the trial court abused its discretion in determining that the probative value of Posner's testimony as to the ten prior cocaine transactions outweighed its prejudicial effect. Inasmuch as the prior acts of Brettholz involved a situation virtually identical to the transaction for which appellants were indicted, and inasmuch as intent was an element of the defense case, there was no error in the admission of Posner's testimony.

Appellants next argue that reversible error was committed at trial when the trial court, pursuant to defense counsel's motion, excluded certain evidence from jury consideration. A statement of the circumstances surrounding the trial judge's ruling will make evident our reasons for rejecting appellants' second argument on appeal.

On cross-examination, government witness Posner, who had already pleaded guilty to the conspiracy count of the indictment, testified that he had taken a scale to Prince's house in a brown shopping bag for the purpose of weighing

the cocaine, and that the shopping bag had contained nothing but the scale (Tr. 393-94). Posner specifically denied that he had also carried marijuana to the Prince house in the shopping bag containing the scale (Tr. 400-01, 433). Later in the trial another government witness, one of the arresting agents, testified that a search of the Prince bedroom had disclosed three small plastic bags of marijuana, found in a brown shopping bag that was stuffed in the drawer of a bureau. The three small bags of marijuana were marked for identification as Government Exhibits 3, 4, and 5.

Thereafter, the last government witness, a chemist for the Bureau of Narcotics and Dangerous Drugs, testified that his chemical analysis had shown that the plastic bag found on the garage roof near the Prince house contained cocaine, and that Government Exhibits 3, 4, and 5 contained marijuana. Defense counsel, Attorney Gerling, moved to strike all of the chemist's testimony on the ground of relevancy, arguing that the four exhibits (the cocaine plus the three bags of marijuana) had not been sufficiently connected to the appellants. The prosecutor later offered the four exhibits into evidence, and defense counsel objected to all four. The trial court immediately called for a side-bar conference wtih counsel, seeking clarification regarding defense counsel's position as to the cocaine and three marijuana exhibits. After hearing defense counsel's objections to the admission of the marijuana exhibits,[2] the court ad-

[2] The colloquy between trial court and defense counsel (Tr. 572) was as follows:

> Miss Gerling: As to Government's Exhibits 3, 4 and 5, the Government has not included them in the indictment, this is not part and parcel of the indictment.
>
> The Court: As I understand it now, Miss Gerling, your objection is to the introduction into evidence of three of

[Footnote continued on following page]

mitted the cocaine and, pursuant to defense counsel's motion, excluded the marijuana exhibits. The court then addressed the jury as follows (Tr. 573):

> You have heard testimony and reference made to marijuana, three packages of marijuana.
>
> They have no relationship whatsoever to this case and you are to give no consideration to them whatsoever. In other words, you are to treat them as something you have never heard about here in this courtroom.

It is to be noted that the foregoing matters occurred during the government's direct case, after defense counsel had cross-examined Posner as to whether he had brought marijuana to Prince's house on the night in question. On the defense case both appellants testified on their behalf and, as noted previously, their defense was that they had gone to the Prince house not to sell cocaine, but to purchase marijuana, a defense which defense counsel reiterated in summation.

At the close of the evidence and prior to the summations of counsel, defense counsel requested a jury instruction, granted by the trial court, making it clear to the jury that appellants were not charged with the purchase or attempted

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the Exhibits numbered 3, 4 and 5 for identification, that is to say their receipt in evidence, as well as to Exhibit number 1 previously marked for identification into evidence; is that correct?

Miss Gerling: Yes, sir.

The Court: So far as your motion is directed or your objection, rather, is directed to the three packages of what has been characterized here as marijuana, your motion is granted, that is your objection is sustained.

It is denied as to the package containing what the chemist has stated is cocaine.

purchase of marijuana, but only with the attempted sale of cocaine (Tr. 904):

> Miss Gerling: * * *
>
> I have one request, and it is so simple I did not bother writing it out. I would like your Honor to so charge the Jury that this is a cocaine case, that my defendants are accused of the intent to sell and distribute cocaine, and not marijuana, that they are not being charged with the purchase or attempted purchase of marijuana.
>
> The Court: Yes, I will do that.[3]

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[3] The colloquy between defense counsel and the trial court continued as follows:

> The Court: Incidentally, your witnesses opened the door to what gave you considerable concern when the trial began. You manifested concern about the possibility of bringing in the question of marijuana so that the Jury might be affected by the fact that they were dealing here with a young defendant or defendants who used marijuana.
>
> Miss Gerling: I was concerned only as to the evidence against my defendants, not to go against the credibility of the witnesses. I was concerned that the marijuana would go into evidence as the cocaine would. That was my concern. We opened the door to the marijuana, yes, but not as a charge in this case. We opened it to go against the credibility of the witnesses in this case (Tr. 904-05).
>
> * * * * *
>
> Miss Gerling: * * * The only instruction I ask [is] for you to remind the Jury that this involves the unlawful intent to distribute cocaine, and not marijuana.
>
> The Court: Of course.
>
> Miss Gerling: Thank you.
>
> The Court: As a matter of fact, as to the offer of sale of marijuana, not only has there been no evidence of it, but it would be contrary to the charges contained in the indictment.
>
> Miss Gerling: Yes, sir. Thank you (Tr. 908-09).

In its charge to the jury, the trial court carefully discussed each count of the indictment, stressing that the crimes charged related to the drug cocaine; the court made no reference to marijuana in its instructions. After the charge, defense counsel requested a jury instruction "insofar as the marijuana is concerned," (Tr. 1019), which the court denied, with defense counsel taking an exception.[4]

On appeal appellants argue that, as a result of the trial court's instruction to the jury to disregard the government's marijuana testimony and exhibits (which instruction defense counsel had specifically requested), they were unable to impeach Posner's credibility since they were "deprived of the force of compelling physical evidence that Posner had lied when he denied bringing marijuana to Prince's house" (Br. 25). We find no merit in this contention.

The language we have quoted from the trial transcript clearly establishes that defense counsel herself requested, and was granted, a court ruling by which the "compelling physical evidence," i.e., the three government marijuana exhibits, were removed from the jury's consideration. The trial court quite properly sustained defense counsel's objection to those exhibits and excluded them, since appellants were not charged in the indictment with any marijuana offenses. Nor did defense counsel ever withdraw her objection to the marijuana evidence.

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[4] Miss Gerling: * * * [Y]our Honor, I am going to respectfully request that your Honor instruct the jury insofar as the marijuana is concerned.

The Court: To do what?

Miss Gerling: Instruct the jury insofar as the marijuana in this case is concerned.

The Court: No, I decline to do that.

Miss Gerling: I respectfully except. (Tr. 1019).

Opinion by Moore, Circuit Judge

Appellants' final contention on appeal relates to Count IV of the indictment, in which appellant Santiago was charged with assaulting federal agent Hall when the latter and government informer Kaplan entered the Prince house through the door being guarded by Santiago. Hall testified that, after identifying himself to Santiago as a federal agent, Santiago punched him and began to holler, "Jimmy, Jimmy," which was appellant Brettholz's nickname. At trial Santiago testified that he could not remember whether Hall had identified himself as a federal agent prior to the commencement of the physical struggle (Tr. 747-49).

On appeal Santiago argues that the trial court committed error by not instructing the jury on a theory of self-defense since, he argues, in both his trial testimony and in defense counsel's summation, the self-defense theory had been clearly raised. This contention is wholly without merit, for the record shows that (1) Santiago's testimony on direct did not clearly establish that he had assaulted Agent Hall in self-defense; (2) although in summation she alluded to the theory, defense counsel did not request an instruction concerning the self-defense allegation; and (3) defense counsel did not take an exception to the court's failure to give the instruction which she had not requested. Under these circumstances it was not error, and certainly not "plain error," for the trial court to omit a reference to the self-defense theory in its jury charge.

The judgments of conviction are affirmed.

APPENDIX B

Court of Appeals Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the first day of November, one thousand nine hundred and seventy-three.

Present: HON. LEONARD P. MOORE,
HON. JAMES L. OAKES,
Circuit Judges,

HON. HAROLD R. TYLER, JR.,
District Judge.

Docket No. 73-1895

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JERRY A. ROSENBLUM, JORY IRA PRINCE, MILTON SANTIAGO, LON M. POSNER, and JAMES BRETTHOLZ,
Defendants,

MILTON SANTIAGO, and JAMES BRETTHOLZ,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk